# EXPERT TESTIMONY IN MEDICAL MALPRACTICE LITIGATION

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*A woman undergoing minor foot surgery sustained a third degree burn when a surgical technician inadvertently placed a hot instrument on her leg. A lawsuit, alleging failure to properly supervise the technician, was filed against the attending podiatrist. The trial court granted summary judgment for the defendant. The court concluded that there was insufficient evidence to find the surgeon at fault for the injury, since the plaintiff had not offered any expert testimony regarding the "roles and responsibilities of surgeons and hospital staff." An appellate court affirmed.*[1]

*In another recent case, a man sustained a broken jaw in a motorcycle accident, and then filed a malpractice suit against the plastic surgeon who had repaired it. At trial, the defendant objected when the plaintiff offered the testimony of a dentist as his expert. The defendant argued that, by state statute, a dentist does not qualify to testify regarding the standard of care for plastic surgery. Ultimately, an appellate court agreed with this argument and reversed the trial court's decision to allow the dentist's opinion.*[2]

Expert opinions are critical to the resolution of legal disputes involving medicine, especially when professional negligence is alleged. To prove their allegations, medical malpractice plaintiffs are usually obliged to provide the court with expert testimony. In response, defendant practitioners routinely rebut such testimony by offering opinions from their own experts.

Problems can arise when no expert testimony is offered, or when the proffered expert lacks expertise in the defendant's specific area of professional practice. There can also be difficulties when the basic theory supporting an expert's testimony has neither demonstrated sufficient reliability nor gained broad acceptance within the scientific community. Both legislation and case law exist that address these problems. Understanding when an expert is required and what an expert "opinion" should include can be valuable to practitioners who become involved in litigation.

## ESTABLISHING MEDICAL MALPRACTICE THROUGH EXPERT TESTIMONY

Experts testify to assist the trier of fact, either a judge or jury. Their testimony must be relevant to the issues being tried and should reference information outside the realm of common knowledge. Meteorologists testify about the phases of the moon on the night a burglary occurred. Ballistic experts explain how close the gun was to the victim or from what direction it was fired. Similarly, health care practitioners may provide information regarding medical sciences or clinical practice.

By definition, a legal claim of medical malpractice demands a determination that a medical practitioner breached the duty owed to a patient to render adequate care. An opinion from a medical expert can transform the suspicions of an injured patient or disgruntled family member into a cognizable complaint. In addition, all states, either by statute or case law, require that evidence of some form be provided at trial regarding the professional standard of care governing the physician's duty and how that standard was

breached. This is best accomplished through an expert witness who is a purported peer of the defendant and who qualifies to explain the technical aspects of the case to the trier of fact.

For every rule there are exceptions, and despite the need for an expert's testimony generally, not all medical claims require such opinions. The doctrine of *res ipsa loquitur* ("the thing speaks for itself") may arise where an error is considered so obvious that it supports a conclusion of negligent practice without the need for expert testimony.

Common fact patterns in medical practice where the doctrine has been applied include cases where a sponge or instrument is left in a surgical cavity or the wrong organ or body part is removed. While *res ipsa* does not conclusively prove that negligence occurred, it does amount to legal evidence sufficient to avoid case dismissal.

*Res ipsa* claims notwithstanding, the vast majority of medical malpractice claims require competent expert testimony. "Competency" is within the discretion of the trial judge, as guided by relevant statutory or case law directives. The Federal Rules of Evidence state that adequate "knowledge, skill, experience, training or education" is necessary for an expert to qualify, while individual states can require clinical experience, or have a locality requirement.[3] It is imperative to know the criteria for the jurisdiction where the suit is litigated.[4]

Generally, a medical malpractice negligence claim is filed when an injured patient or family member becomes convinced that improper medical care has caused an injury. In court, an expert opinion is required to establish: 1) the standard of proper professional skill or care; 2) a failure by the defendant to conform to that standard; and 3) a causative link between that breach and the patient's injury. Such testimony can only be established by someone deemed knowledgeable regarding the applicable standard of care, specifically, a professional peer.

At the outset, a case was presented in which no expert opinion was offered. The claim regarding the burns inflicted by a hot surgical instrument was based on the legal concept for vicarious liability. The podiatrist was alleged to be liable through the negligence of an erring assistant whom he failed to supervise. Unfortunately, the plaintiff offered no expert testimony to establish what the doctor's supervision should have entailed. Since the standard of care was never defined, the trial court dismissed the suit. The court determined that establishing the podiatrist's supervisory responsibilities did indeed require an expert's opinion, since those responsibilities are not within the common knowledge of a layperson. Without the missing testimony, the plaintiff did not have sufficient evidence to prove her case.

More common is the case where an expert is offered by the plaintiff and prepared to testify but is arguably not qualified. Aside from fraud, an expert can fail to qualify either because the state's "locality rule" prohibits the testimony or because the witness' area of expertise is different from that of the defendant.

## WHO MAY TESTIFY

Historically, care rendered by a medical malpractice defendant was measured legally against the professional standards of locality where the defendant practiced. An important rationale for holding physicians to local

standards was to protect rural general practitioners. Otherwise, they might be held to the same standards of practice as urban physicians, who had substantially greater access to technology, research, and consultative opinions. Consequently, an expert called to testify against the defendant physician was required to be from the same locality and, therefore, familiar with the existing standards in that region. As medicine and communication advanced, these theoretical foundations for the "locality rule" began to erode, particularly for defendants involved in specialty medical practice.

In one notable case, the Supreme Court of Mississippi expressly replaced the precedent "locality rule" in 1985 with a national standard for professional care.[5] There, a patient underwent an exploratory laparotomy for a suspected bowel obstruction, was moved from the recovery room to a private room, and expired. At trial in the subsequent wrongful death suit, the testimony of two Ohio physicians was offered to prove negligence in postoperative monitoring. The trial court barred the testimony of these out-of-state experts as violative of the locality rule. The experts, applying a *national standard* of professional skill and competence, would have testified that the defendant breached an applicable standard of care.

On appeal, the state supreme court reversed and decided that the proffered testimony should have been allowed. A common standard was found to apply to all physicians practicing in the same specialty throughout the United States, and the court pointed out that patients should expect similar postoperative care regardless of whether they were "in Cleveland, Ohio, or Pascagoula, Mississippi."

The now common practice of holding local physicians to a national standard enlarged the pool of potential expert witnesses. Applying a national standard allows any competent and qualified physician in that specialty to offer an opinion as to the adequacy of care rendered by a local physician.

A 1995 decision from the Supreme Court of Michigan illustrates this relaxation of admissibility.[6] The mother of a deceased patient brought a medical malpractice claim after her son suffered cardiac arrest. The plaintiff's expert witness was an internist from Philadelphia and a member of the medical school faculty at the University of Pennsylvania. He testified about the applicable standard of care for residents and interns generally but professed no knowledge of the standards as practiced in Detroit. A jury verdict for the plaintiff was reversed by an intermediate appellate court, because the expert had not been properly qualified. The Supreme Court of Michigan disagreed and reversed the appellate decision. The opinion reiterated that, for Michigan, "the standard of care for general practitioners is that of the local community or similar communities and is nationwide for a specialist." The court concluded that the expert's curriculum vitae served as adequate qualification for his ability to testify to Detroit standards, despite not being formally questioned about them on the stand.

Another problem emerges when an expert practices in a different clinical specialty than the provider. Statutory law may control admissibility in these instances. In the second introductory case, a motorcycle accident victim was treated by a plastic surgeon but offered a dentist's testimony in the subsequent malpractice suit. The Court of Appeals of Kansas, based on a statutory provision, determined that the dentist could not testify.[7] The statute required that a plaintiff's witness "be engaged in actual practice in the same field in which the defendant is licensed."[8] Since the defendant was a licensed medical practitioner and the plaintiff's expert was a licensed dentist, the testimony had to be excluded under the plain meaning of the statute. Absent a statutory exclusion, courts may admit testimony from various sources.

A trial court in South Carolina excluded the testimony of an emergency room technician regarding proper intubation procedures.[9] The plaintiff alleged his two front teeth were chipped by the defendant anesthesiologist during intubation. The technician's testimony, excluded by the trial court, was deemed appropriate on appeal, since the requirement for admissibility in malpractice cases is for the witness to "have special expertise by way of training to compare with that of the physician who is defending the charges." After a lengthy discussion of the technician's qualifications and experience regarding intubation, the appeals court opined that the proper emphasis was on intubation procedures—an area in which the witness was qualified to testify.

Where the witness is a physician, not a medical technician, some courts will allow greater leeway in admitting the testimony. This demonstrates a recognition by the judiciary that any physician, general practitioner or specialist, has acquired knowledge and experience that the average layperson has not. Nevertheless, a determination on whether a physician's breach of duty caused the patient's injury is often substantially better facilitated by the testimony of a specialist. A recent Texas decision demonstrates the point.[10]

After being assaulted and struck on the neck, a young lady was brought to the emergency department. She was nauseated, disoriented and uncooperative. Physicians neither performed a CT scan of the head, nor consulted a neurosurgeon. Following her discharge, she developed an excruciating headache and vomiting, and a subsequent CT scan revealed a skull fracture. The patient died of her injuries.

During the trial for wrongful death brought by the girl's parents, plaintiffs offered an emergency medicine physician who testified on the standard of care generally in the emergency department and the negligence of the defendant physicians. However, his attempt to pinpoint the actual **cause** of death met with objections from the defendants. The defense argued that only a neurosurgeon "should testify that the failure to immediately perform a CT scan leading to an untreated brain injury" proximately caused the victim's death. While the trial court agreed with the defendants, the court of appeals did not, concluding that "[t]he fact that [the witness] is not a specialist in neurosurgery goes to his credibility with the jury, not the admissibility of his testimony."

In determining whether to let a physician testify in an area that is not his specialty, the courts often stress the crucial reason an expert is needed. If a potential witness has the skill, knowledge, or ability to draw an inference that the average layperson could not draw, then that may be enough to qualify him or her to testify. Whether a specialist will be given more credence than another physician is solely for the jury to decide.

## *DAUBERT*

The last issue to be discussed regarding expert testimony in medical malpractice litigation is, in theory, the most fundamental: Should proffered testimony be excluded because it is unsound scientifically, therefore unreliable and necessarily irrelevant to a jury determination?

For almost 70 years, many courts applied the *Frye* rule to include or exclude scientific evidence.[11] This rule derived from a criminal case heard in federal court in the District of Columbia. The court reviewed whether a primitive lie detector test using systolic blood pressure should have been admitted based on one

"expert's" testimony. The court found no "general acceptance" within the scientific community regarding the theory, and the expert was consequently rejected. The court emphasized that "general acceptance" within the appropriate professional community would be the criterion courts would look to in deciding admissibility. Put another way, if the relevant scientific community had reached consensus, then the federal courts could hear the evidence.

In the following years, many commentators in the legal literature criticized the *Frye* rule. Some considered the effect of the rule as too conservative, excluding the results of novel studies—even those proven, in time, to be valid. Most importantly, many argued that the rule of evidence, derived from a single case, was actually superseded by the adoption of the Federal Rules of Evidence in 1973.

In an attempt to resolve this controversy, the U.S. Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[12] a suit brought to recover for birth defects allegedly caused by the mother's ingestion of Bendectin during her pregnancy. At trial, the defendant pharmaceutical firm objected to the substantive use of expert testimony offered to support the plaintiff's case. The testimony would have established a link between birth defects and Bendectin, premised upon "recalculations" and re-analysis of existing scientific literature that the witnesses had never published or subjected to peer review. Employing language similar to *Frye*, the trial court excluded the evidence, a determination that was appealed to the federal circuit court. The Supreme Court agreed to review the case and then remanded it for a new trial after explicitly rejecting the applicability of "general acceptance" to scientific evidence in the federal courts.

The Supreme Court opinion does not address the value, worth, or reliability of the evidence offered. The opinion simply declared an end to the era of the *Frye* rule as an absolute determinant of admissibility. General acceptance is no longer a requisite component of admissibility. In essence, if the testimony will assist the trier of fact in understanding a relevant piece of evidence, then such testimony will be permitted from qualified experts. The court indicated, however, that "knowledge", "skill", and "experience" require a certain degree of credibility and authoritative backing. Consistent with a reading of the Federal Rules of Evidence in their entirety, the Supreme Court stated that evidence similar to that submitted in *Daubert* was to be the subject of a separate hearing by the trial court judge.

Trial judges were offered several suggestions for use in making a determination on the admissibility of technical scientific evidence. Judges should ask: 1) whether the proposed theory is testable, or has been tested; 2) whether it has been subjected to publication and peer review; 3) what the error rate is; 4) whether the theory or technique is accepted in the scientific community; and 5) the extent to which the 'scientific method' was used. The Court emphasized that no one factor is determinative and provided judges with considerable discretion.

Questionable scientific evidence is often offered in medical malpractice or toxic tort litigation. A recent and well-publicized lawsuit in Florida demonstrates the applicability of *Daubert*.[13] A federal district court granted summary judgment to the defendant producers of cellular phones because the plaintiff was unable to offer competent testimony that his wife's brain tumor was caused or exacerbated by her use of a cellular phone. The plaintiff's expert was ready to testify that "the use of a cellular telephone is a health hazard and would likely accelerate the growth of brain tumors in humans." However, "the expert's bold assurance of validity" was not enough to satisfy the judge, and absent expert testimony as to causation, the suit was summarily dismissed.

Much like the disparate opinions of scientific experts, different courts examining similar facts can reach different conclusions. Statutes of the controlling jurisdiction, court precedents and evidentiary rules can be determinative. The *Daubert* and *Frye* tests are both worth knowing, since *Daubert* directly controls only federal courts and a significant number of states still utilize the older test of "general acceptance" for admissibility.

## CONCLUSION

Rare is the experienced clinician in the United States who has never been engaged in a medicolegal dispute. For health care providers, knowing what is required from expert testimony, who may testify as an expert in a given jurisdiction, and what testimony will be allowed into evidence is integral to understanding that sector of the legal system they most commonly frequent.

## REFERENCES


1. *Sims v. Schweiker*, 651 N.E.2d 348 (Ind. 1995).

2. *Tompkins v. Bise*, 893 P.2d 262 (Kan. 1995).

3. Fed. R. Evid. 702.

4. Amtz RN. Competency of medical expert witnesses: Standards and qualifications. Creighton Law Review. 1991; 24: 1359.

5. *Hall v. Hilbun*, 466 So.2d 856 (Miss. 1985).

6. *Bahr v. Harper-Grace Hospitals*, 528 N.W.2d 170 (Mich. 1995).

7. *Tompkins v. Bise*, 893 P.2d 262 (Kan. 1995).

8. KAN. STAT. ANN. § 60-3401 (1993).

9. *Gooding v. St. Francis Xavier*, 454 S.E.2d 328 (S.C. 1995)

10. *Heise v. Presbyterian Hospital of Dallas*, 888 S.W.2d 264 (Tex. Ct. App. 1994).

11. *Frye v. United States*, 293 F.1013 (D.C. App. 1923).

12. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993).

13. *Reynard v. NEC Corporation*, 887 F.Supp. 1500 (Fla. 1995).